No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S REPLY BRIEF.

O'MELVENY & MYERS,
SIDNEY H. WALL,
CLYDE E. TRITT,
433 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellant.

FILED
JUL 11 1951
PAUL P. O'BRIEN,

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

APPELLANT'S REPLY BRIEF.

The Facts.

Appellee has not questioned our statement in Appellant's Opening Brief (p. 3) that the facts therein set forth were limited to those contained in the Pre-Trial Stipulation (App. A to Op. Br.), which the District Court found to be true, or which otherwise appeared without controversy. Yet while the statement of facts contained in Appellee's Brief (pp. 2-20) purports to be a complete review of the facts, it is noteworthy that appellee carefully omits reference to almost all the facts contained in the Pre-Trial Stipulation [Ex. 50].

The Relationshp Between the Parties.

Without referring at all to Paragraph 6 of the Stipulation (App. A to Op. Br. pp. 2-4) containing the essential facts regarding the relationship of the parties or to the terms of the written contract in effect between them at the time of Sanger's entry into the service [Exs. 15 and

16; Op. Br., Apps. C, D, and E], appellee refers instead to various labels such as "salesman," "representative," and "district manager" used in the agreements and in correspondence (App. Br. pp. 3-5). As pointed out in our Opening Brief (pp. 45-50) such labels cannot vary the effect of the essential facts of the relationship which are principally set forth in the stipulation and which appellee chooses to ignore.

Furthermore, appellee points out (p. 4) Mr. Pendleton's testimony that there was no change in the arrangement from the time Sanger first came with the company until he went into the service, without noting that the essence of that arrangement was at all times as set forth in Paragraph 6 of the stipulation, and without calling attention to Pendleton's testimony (in answer to the Court's question just preceding that quoted by appellee) to the effect that Plomb never regarded Mr. Sanger as an employee of the company at any time [R. 166].

Sanger's Reception by Plomb.

Throughout their brief appellee's counsel seek to create the impression that Mr. Sanger met with a cold reception from Plomb upon his discharge from service (pp. 8-11) and that Plomb was relying upon legalisms and technicalities (p. 56) in order to avoid taking him back in 1946 when business was good and Plomb "did not need a salesman of Sanger's caliber" (p. 43). The actual facts are exactly to the contrary. The uncontradicted testimony was that although Plomb believed that Sanger had been an independent contractor and therefore was

not entitled to the benefits of the Selective Service Act,[1] it had a high regard for his ability as a salesman and was anxious to have him back on a full-time basis.

Mr. Kerr testified as follows in response to questions by the Court [R. 152]:

> "The Witness: The position we took, your Honor, was that we did not believe that he had any rights under the GI Bill. However, we had a great deal of regard and respect for him, and had we been able to work out some arrangement, would have been glad to have him back in the organization.
>
> The Court: In other words, you made him these offers because you wanted him back, not because you thought he had any legal right to be employed, is that correct?
>
> The Witness: That is correct.
>
> The Court: Did you so state to him in substance and effect?
>
> The Witness: That is correct."

Mr. Sanger himself admitted that Kerr in January, 1946, "told me that he certainly looked forward to having me with the Plomb Tool Company" [R. 60]. Sanger further testified [R. 217]:

> ". . . I was informed by Mr. Kerr that I did not have any rights under Selective Service, but they did want me with them because they respected my sales ability.
>
> The Court: In January?
>
> The Witness: Yes, sir.

---

[1]Plomb was not without experience under the reinstatement provisions of the Act, for while Sanger was the only Plomb sales representative who entered the service (as pointed out in Appellee's Brief, p. 7) there were approximately 300 employees of the company who did so [R. 193-194].

> Q. (By Mr. Kenny): When was the first time you were told that? Was that in January? A. The first time was in, I think, the first meeting in December, is the way I recall it, but it was within a week period there."

In view of the company's expressed conviction that Sanger had been an independent contractor and had no reinstatement rights under the act, there would have been no reason for it to offer him any position if it had desired to stand upon what it believed to be its legal rights, nor would there have been any reason for the repetition of the offers in Kansas City in March, 1946 [R. 132-133] and again in Atlantic City in December, 1946 [R. 134-135, 179, 180].

Plomb wanted Sanger back on a full-time basis, and that, as Mr. Kerr testified, was the stumbling block [R. 123]. Appellee's counsel seek to create the impression that other factors prevented the parties from reaching an agreement (App. Br. p. 10). They state (App. Br. p. 9) that subject to his request for time to give the other firms some notice, "Sanger was willing to work for Plomb exclusively and in any territory where the company wanted him to work" [citing R. 105]. In this connection appellee's counsel not only ignore the stipulated facts which were found by the Court to be true, but they misconstrue the testimony. The contrary fact is shown in Paragraph 11 of the Pre-Trial Stipulation (App. A to Op. Br. p. 6) which reads as follows:

> "During the month of January, 1946, plaintiff advised defendant that he was unwilling to sever his connections with other manufacturers and was therefore unwilling to accept either of the positions offered him by defendant."

And Mr. Sanger's decision in this regard is confirmed by his own letter to Mr. Kerr dated February 10, 1946 [Ex. 31] in which he said:

> "My loyalty will not allow me to leave the other firms that I represent, at this time, to go with Plomb exclusively. I am going to give them representation at least until the first of the year."

Sanger's testimony regarding his willingness to work for Plomb exclusively [R. 105] related to willingness *at the time of trial* and not at the time when the offers were made as appellee's counsel seek to imply. In other words, by the time of the trial Mr. Sanger had reconsidered his 1946 refusal to drop his other lines, and had decided that he would now be willing to work for Plomb exclusively.

As we have shown, Sanger's reception by Plomb was not the "cold, aloof, brush-off" claimed in Appellee's Brief (p. 57). On the contrary, although the company did not believe it owed him a legal duty, it offered him two alternative positions because it wanted him back, and Sanger refused because he was unwilling to become a full-time Plomb employee and relinquish the independent aspects of his prewar relationship with the company which enabled him to handle other lines of merchandise. In short, he was unwilling to return upon any basis other than that of an independent contractor.

Plomb's Offer to Sanger.

Appellee asserts (p. 12) that the offer made to him by Plomb was indefinite with respect to the method of dividing the commissions of the territory between him and the other salesmen who were to assist him. As pointed out in our Opening Brief (p. 63) Mr. Sanger admitted that

Kerr told him "We don't pay direct like we did, that is the one man. It is a split basis and the manager of the zone gets 40 per cent and 60 per cent is divided among the other two men" [R. 216-217]. It is difficult to see how the offer could have been made much more definite in this respect, and in any event Sanger's steadfast refusal to give up his other lines made it unimportant to go further with these details of the offer which he was unwilling to accept on other grounds (see Op. Br. p. 63).

With respect to the company permitting Schrenker to handle other lines during 1946, we have pointed out in our Opening Brief (pp. 55, 64) that the company had granted such permission to Schrenker because he was devoting his full-time efforts to Plomb business, leaving his other lines to his assistants, an arrangement far different than that which Sanger hoped to make.[2]

The Increase in Business.

Appellee states that there was no substantial post-war growth in volume in his other lines, comparing the $20,-244.49 derived from his other lines in 1941 and 1942 (*two* years) with $25,968.69 received by him from the other lines in 1946 (*one* year) (App. Br. p. 16). In fact Sanger's earnings from lines other than Plomb increased from approximately $10,000 in *each* of the years 1941 and 1942 to nearly $26,000 in 1946 when Sanger was devoting his full time to these other lines [Ex. Q], representing an increase to about 260 per cent of the 1942 volume (as pointed out in Op. Br. p. 74).

---

[2]The record reveals the interesting if not strictly material fact that Schrenker, whom appellee's counsel refer to as a "stay-at-home salesman" (App. Br. pp. 13, 41, 51, 55) had himself served in World War I and had a son in World War II [R. 137].

ARGUMENT.

A. Under the Federal Rules of Decision Act, as Amended in 1948, Appellee's Action Is Barred by the California Statute of Limitations.

Appellee contends that his action is one of exclusively equitable cognizance brought to enforce a federally created right and therefore is not barred by Section 338, subdivision 1, of the California Code of Civil Procedure (App. Br. p. 22 *et seq.*).

Appellee argues that the award of damages in this case is merely ancillary to the equity jurisdiction to compel reinstatement, but he somewhat inconsistently attempts to brush aside the case of *Walsh v. Chicago Bridge and Iron Company* (N. D. Ill., 1949), 90 Fed. Supp. 322 (see Op. Br. p. 25), on the ground that there the equity jurisdiction was not invoked because the veteran sought only damages without reinstatement. If appellee is correct in his contention that the damage award in this case is merely ancillary to the equity jurisdiction (App. Br. p. 23), then the damages sought in the *Walsh* case must have still retained their ancillary equitable character and the *Walsh* case must stand for the proposition that the Rules of Decision Act, as amended in 1948, does, as we contend, require the application of state statutes of limitations to *equity* cases to enforce federally created rights.

On the other hand, if the damage claim in such a veteran's action is not ancillary to the equitable claim for reinstatement, then the *Walsh* case clearly stands for the proposition that the state statute of limitations is applicable at least to the portion of appellee's claim by which he sought and was awarded damages.

Even if the entire action, including the claim to damages as well as the claim to reinstatement, be regarded as one of equitable cognizance, we submit that the only proper construction to be given to the Rules of Decision Act, as amended in 1948, requires application of the state statute of limitations to the entire action.

Prior to 1948 when the Rules of Decision Act made state laws applicable only in "trials at common law" in the federal courts, it was construed to require the application of state statutes of limitations to actions at law to enforce rights created and existing under federal statutes which specified no period of limitation. (*Campbell v. Haverhill* (1895), 155 U. S. 610 (cited in Op. Br. p. 26).) The excellent discussion of the rationale of this rule in the opinion in that case is quoted in the Appendix to this brief.

In 1938 the Supreme Court in *Erie R. R. v. Tompkins,* 304 U. S. 64, decided that state law, unwritten as well as written, must be applied by federal courts in all diversity cases except in matters governed by the federal Constitution or statutes. And a week later in *Ruhlin v. New York Life Insurance Co.,* 304 U. S. 202, the same doctrine was applied to a diversity suit in equity. Following these decisions and *not* on the basis of the Federal Rules of Decision Act, the Supreme Court in *Guaranty Trust Co. v. York* (1945), 326 U. S. 99, held that a federal court must apply the state statute of limitations in a suit for equitable relief where jurisdiction is based solely upon diversity of citizenship.

In 1946, and still prior to the amendment of the Rules of Decision Act, the Supreme Court decided *Holmberg v. Armbrecht,* 327 U. S. 392, relied on in Appellee's Brief (pp. 25-27), holding that a state statute of limitations was not required to be applied to a suit in the federal court

involving a federally created right for which the sole remedy was in equity. The court made it clear that the rule of *Guaranty Trust Co. v. York, supra,* was limited to diversity cases. This decision was entirely correct in the light of the law as it then stood, for the doctrine of the *Erie R. R.* case had no application to suits involving federally created rights and the Rules of Decision Act at that time made state laws applicable only in "trials at common law."

In the *Holmberg* case the court made it clear that the rule there announced applied "where Congress has not spoken" (327 U. S. at 395). Subsequent to the decision in the *Holmberg* case, Congress spoke by amending the Rules of Decision Act, effective September 1, 1948, substituting "civil actions" for "trials at common law" (28 U. S. C., Sec. 1652, see Op. Br. pp. 25, 28). As noted in our Opening Brief (p. 28) this change was made in the light of the Federal Rules of Civil Procedure which, in 1938, were made applicable "in all suits of a civil nature whether cognizable as cases at law or in equity" (F. R. C. P., Rule 1), and which provided "there shall be one form of action to be known as 'civil action' " (F. R. C. P., Rule 2).

Appellee argues (App. Br. p. 28) that this amendment did not in any way change the existing law. In view of the union of law and equity in the federal courts and the establishment of one form of action, a "civil action," we submit that the only logical construction to be given to the amended statute is to require application of state statutes of limitations (in the absence of a limitation period specified by Congress), to all civil actions in the federal courts, whether they would formerly have been classified as legal or equitable, and even though the fed-

eral jurisdiction is based on a federal statute, as in this case.

Appellee would deprive the amendment of any effect whatsoever. In effect he would substitute for the words "civil actions" something like "civil actions in cases where the federal jurisdiction is based solely upon diversity of citizenship" (which would be anomalous in view of the holding in *Guaranty Trust Co. v. York,* 326 U. S. 99, *supra,* that state laws must be applied in diversity cases irrespective of the Rules of Decision Act), or "civil actions, except actions for the enforcement of rights created by federal statute which were enforceable only on the equity side of the federal courts before the union of law and equity." No such violence to the language of Congress can be supported.

An argument similar to that of appellee was rejected in *Ex parte Collett* (1949), 337 U. S. 55, involving 28 U. S. C., Sec. 1404(a), a part of the same revision of the Judicial Code which produced the amendment to the Rules of Decision Act here in question. Section 1404(a) authorizes a federal district court, for the convenience of parties and witnesses in the interest of justice, to transfer "any civil action" to any other district where it might have been brought; and that section was there held applicable to suits under the Federal Employers' Liability Act despite the provision in the latter act permitting a suit to be brought thereunder in any district in which the defendant is doing business. Chief Justice Vinson there said (337 U. S. at 58):

> "The court below relied on the language of §1404(a), *supra,* which it regarded as 'unambiguous, direct, clear.' We agree. The reach of 'any civil action' is unmistakable. The phrase is used with-

> out qualification, without hint that some should be excluded. From the statutory text alone, it is impossible to read the section as excising this case from 'any civil action.' "

To the same effect is *Kilpatrick v. Texas & Pacific Railway Co.* (1949), 337 U. S. 75, and in *U. S. v. National City Lines* (1949), 337 U. S. 78, the same code provision for transferring "any civil action" was held applicable to an action by the United States for an injunction and other relief under the Sherman Act, a case clearly involving a purely federal right and traditionally cognizable only in equity.

Congress having subsequently spoken through its amendment of the Rules of Decision Act, the case of *Holmberg v. Armbrecht, supra,* is no longer controlling here; and even if this case be considered as one solely cognizable in equity, it is subject to the California statute of limitations embodied in Section 338, Subdivision 1, of Code of Civil Procedure, since Congress has specified no time for bringing suit under the Selective Service Act.

B. Appellee's Claims Are in Any Event Barred by Laches and Delay.

We have already dealt in our Opening Brief (pp. 35-37) with appellee's contentions that Plomb contributed to and was not prejudiced by Sanger's delay in filing suit, and we have cited cases (Op. Br. pp. 30-31) showing that laches are not precluded from attaching either by consultation with the Selective Service System and the United States Attorney or by direct negotiations with the alleged employer. Appellee seeks to distinguish *Cummings v. Hubbell,* 76 Fed. Supp. 453; *Caldwell v. Harman,* 12 C. C. H. Labor Cases, Par. 63,671, and *Daniels v. Bar-*

field, 77 Fed. Supp. 283, cited by us (Op. Br. pp. 33-34), on the ground that other factors existed in each of those cases. It is true that other factors did exist, but a clear alternative ground for the holding in each case was the application of the doctrine of laches.

In seeking to avoid the application of *Russell v. Todd,* 309 U. S. 280 (cited in Op. Br. pp. 34-35), appellee argues that the Federal courts will not apply a state statute of limitations "unless that statute applies to like causes of action in the state courts, *i. e.,* exclusively equitable causes of action," and he takes the same position as that taken by the District Court in its denial of appellant's motion for summary judgment and argues that there is no "like cause of action" in California because there is "no state statute giving reinstatement rights *against private employers*" (App. Br. p. 33).

As pointed out in our Opening Brief (pp. 29-30, 35) there are state statutes giving school teachers and police officers rights to reinstatement in their positions, and actions to enforce those rights have been held subject to the statute of limitations contained in Section 338, Subdivision 1, of the Code of Civil Procedure. (*Jones v. Board of Police Commissioners,* 141 Cal. 96, 74 Pac. 696; *Harby v. Board of Education,* 2 Cal. App. 418, 83 Pac. 1081.) These actions to compel reinstatement in positions with public employers are just as exclusively equitable in nature as is appellee's action for reinstatement under the Selective Service Act. They are identical with appellee's action in their equitable aspects, the only distinction being in the public, rather than private, character of the defendant. This, we submit, is a distinction without a difference.

Wholly aside from the construction placed upon the Rules of Decision Act, this action is barred under the rule of *Russell v. Todd, supra.*

C. Appellee Was an Independent Contractor and Therefore Was Not Entitled to the Benefits of the Act.

1. Independent Contractors Are Not Protected by the Selective Training and Service Act.

We have never contended that Sanger was outside the protection of the Act simply because he was paid commissions instead of a salary. Nevertheless the courts have consistently held that independent contractors are excluded from the coverage of the Act.

The so-called "mischief-remedy" rule of *N. L. R. B. v. Hearst Publications* (1944), 322 U. S. 111, which appellee argues should be applied here (App. Br. pp. 36-38), has already been considered by this Court in relation to Social Security Act coverage of independent contractors. In *Henry Broderick, Inc. v. Squire* (9 Cir. 1947), 163 F. 2d 980, this Court reviewed in detail the facts of the relationship in question, reversed the judgment of the district court (59 Fed. Supp. 109) which was based primarily on the *Hearst* case, and held that the relationship was that of independent contractor in the light of the tests laid down in the later case of *U. S. v. Silk* (1947), 331 U. S. 704. The *Broderick* case was later relied upon by this Court in *Brown v. Luster* (1947), 165 F. 2d 181 (Op. Br. pp. 38-44).

At page 38 of his brief appellee cites a number of cases for the proposition that the Selective Service Act has been extended to cover veterans who left positions where

they were not employees in the common law sense of the term. Not one of those thirteen cases holds or even intimates that an independent contractor is subject to the Act. In fact only three involve any question as to whether the veteran was or was not an independent contractor. (*King v. Southwestern Greyhound Lines* (10 Cir. 1948), 169 F. 2d 497; *Lee v. Remington-Rand* (S. D. Cal. 1946), 68 Fed. Supp. 837, and *MacMillan v. Montecito Country Club* (S. D. Cal. 1946), 65 Fed. Supp. 240.)

Not one of the thirteen cases involved a combination of facts such as are involved here, where a sales representative handled other lines of merchandise, paid his own expenses, employed his own assistants, selected his own itineraries and operated with the degree of independence enjoyed by Mr. Sanger. None of them involved facts at all comparable with those of *Brown v. Luster,* 165 F. 2d 181, decided by this Court and analyzed at length in our Opening Brief (pp. 38-44).

2. The Conclusion That Sanger Was Not an Independent Contractor Is Not Supported by the Findings of Fact and Is Contrary to the Uncontroverted Evidence.

Rule 52(a), F. R. C. P., relied on by appellee (App. Br. pp. 39-40), has no application to appellant's contention that Sanger was an independent contractor, for appellant has made no attack upon the *findings* of the District Court in this connection. The District Court *concluded* that Sanger was not an independent contractor [Concl. I, R. 17], and it is that *conclusion* which we earnestly contend is not supported by the findings and is contrary to law. In any event this is not a case where the trial judge's opportunity to observe the witnesses and

evaluate their credibility is important as in *Allyn v. Abad* (3 Cir. 1948), 167 F. 2d 901 (App. Br. p. 39), for the facts upon which we rely in this connection are contained in the Stipulation of Facts or otherwise appear from uncontroverted evidence.

In *Brown v. Luster,* 165 F. 2d 181, the district court had found the facts relating to the relationship between the veteran and his alleged employer and the facts set forth in the left hand column of the comparison of that case with this one in our Opening Brief (pp. 40-43) were taken directly from those findings of the trial court. The trial court there concluded that the veteran was an independent contractor and this Court properly held that the findings were sufficient to support that conclusion. We respectfully submit that the District Court's finding of substantially similar facts in this case cannot support its contrary conclusion that Sanger was *not* an independent contractor and that this Court should reverse the decision in the light of the undisputed facts just as it did in *Henry Broderick, Inc. v. Squire,* 163 F. 2d 980, *supra.*

The cases of *Rosenbaum v. Ceco Steel Products Corp.,* 84 Fed. Supp. 954, and *Frank v. Tru-Vue, Inc.,* 65 Fed. Supp. 220, cited in our Opening Brief (pp. 44, 47, 52), are also directly in point on the independent contractor question despite appellee's attempt to distinguish them (App. Br. p. 39). In each of those cases the court first concluded that the veteran had been an independent contractor and was not entitled to the benefits of the Act and then, as an alternative ground of decision, concluded that even if he had been an employee the defendant's circumstances had in any event so changed as to make reinstatement unreasonable.

D. Appellant's Circumstances Had so Changed as to Make It Unreasonable to Reinstate Appellee in His Exact Pre-War Position and Appellant Offered Him a Position of Like Seniority, Status and Pay.

1. Changed Circumstances.

Appellant has made no claim that its increased post-war business made salesmen unnecessary as was the case in *Loeb v. Kivo* (2 Cir. 1948), 169 F. 2d 346 (App. Br. p. 44), and *Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386 (App. Br. p. 43).

Here the difficulty was not a lack of need for salesmen but rather was Plomb's desire for more of Sanger's time than he was willing to give. The company did not retain Schrenker through 1946 on the identical basis which Sanger enjoyed before the war, as appellee contends (App. Br. pp. 41-42), for Schrenker was devoting his own full time to the sale of appellant's products [R. 136, 140, 171; Op. Br. pp. 55, 64].

2. The Offer of the Kansas City Territory Was Equivalent in Seniority, Status and Pay.

The cases of *Levine v. Berman* (7 Cir. 1947), 161 F. 2d 386, and *Mihelich v. F. W. Woolworth Co.* (D. Ida. 1946), 69 Fed. Supp. 497, cited by appellee (App. Br. pp. 45-48), involved situations where the veteran was offered an entirely different territory requiring him to move and make new contacts. The same was true of *Salter v. Becker Roofing Co.,* 65 Fed. Supp. 633, and *Whitver v. Aalfs-Baker Mfg. Co.,* 67 Fed. Supp. 524, cited in appellee's quotation from *Schwetzler v. Midwest Dairy Products Corp.* (7 Cir. 1949), 174 F. 2d 612 (App. Br. p. 45). Plomb's offer to Sanger was not of this sort, for

he was offered his old Kansas City territory with only a minor reduction in area. The cases cited in appellee's quotation from the *Schwetzler* opinion (App. Br. p. 45) were cited by the court there purely for the purpose of distinguishing them, and the court concluded that the employer in the *Schwetzler* case had discharged its duty when it offered the veteran a route *different* from that which he had previously had but one which afforded comparable opportunities as to seniority, status and pay.

As pointed out in our Opening Brief (pp. 60-62) the offer made to Sanger afforded him opportunities which were not only comparable to those offered by his pre-war arrangement, but which also would have given him an increased share in the post-war prosperity of the company.

E. The Damages Awarded Appellee Are Excessive.

Appellee contends that the "right to compensation runs from date of application for reemployment" (App. Br. p. 48). Basic reliance is placed by appellee upon *Coon v. Liebmann Breweries* (D. N. J., 1949), 86 Fed. Supp. 333 (App. Br. p. 49), in which Judge Smith criticizes several of the cases cited by appellant (Op. Br. p. 67) which hold that where a veteran unreasonably delays in instituting the action, damages are limited to the period subsequent to its filing. But the *Coon* case is the only one of its kind, a definite minority compared to the numerous cases holding the other way. Moreover, in the *Coon* case there was a delay of only one year and three months as compared with the three and one-half year delay in the present case.

Appellee cites seven additional cases as holding "that compensation for failure to reemploy runs from the date of application for reemployment" (App. Br. pp. 49-50). Those cases are completely irrelevant in rebuttal to appellant's proposition that damages should be limited to the period following the commencement of this action on September 22, 1949. In only one of them did the period of delay exceed one year, and in the others the period was only a few months.

Appellee cites four cases in which courts "initially ordered restoration years after the cause of action arose" (App. Br. p. 50). Of these four cases the longest delay between the time the veteran asked reinstatement and the time the action was brought was sixteen months in *Thompson v. Chesapeake & Ohio Ry. Co.* (S. D. W. Va., 1948), 76 Fed. Supp. 304. Significantly that is one of the cases (cited by appellant in Op. Br. p. 67) which hold that damages are limited to the period, after commencement of the action due to the veteran's delay in filing the action, even though a portion of the time was consumed by consulting the United States Attorney who ultimately filed suit and prosecuted the action.

Appellee's replies to the remaining four of appellant's five counts of error with respect to the damages are all lumped together under the heading "The Damages Awarded Appellee Fall Far Short of the Maximum That Could Have Been Awarded" (App. Br. p. 50). He cites six cases (App. Br. p. 52) as having awarded damages for periods exceeding one year. Four of these cases are incorrectly cited and the damages awarded quite clearly did not exceed the period of one year, as follows: *Parker v. Maynard Boyce* (S. D. Cal., 1946), 74 Fed. Supp. 581, five months; *Thompson v. Chesapeake & Ohio R. Co.*

(S. D. W. Va., 1948), 76 Fed. Supp. 304, eleven and one-half months; *Noble v. International Nickel Co., Inc.* (S. D. W. Va., 1948), 77 Fed Supp. 352, two and one-half months; and *Martin v. John S. Doane Co., Inc.* (D. Mass., 1947), 68 Fed. Supp. 783, one year. Thus only two of the six cited decisions actually awarded damages for a period in excess of one year, and in one of those, *Delaney v. Special Service Co.* (E. D. La., 1948), 76 Fed. Supp. 414, damages were awarded for the period of only one year and thirteen days.

Appellee does not comment upon the authorities cited by us in support of our contention that the damages should have been computed on the basis of the 7½% commission rate in effect for all salesmen in 1946 and on the basis of the Kansas City territory as it then existed (Op. Br. pp. 69-72). His only answer with respect to the commission rate is his somewhat surreptitious attempt to create doubt that Schrenker's commissions in 1946 were on the basis of 7½% which prevailed for all salesmen (App. Br. p. 55). The uncontradicted evidence of Mr. Leach [R. 140] was that the 7½% commission rate applied to *all* representatives and was established January 1, 1944.

Nor is there merit in appellee's purported "short answer" to appellant's complaint that Sanger was permitted to retain his earnings from other lines without deduction. This was not "exactly what it was permitting itself in regard to the stay-at-home salesman Schrenker," as appellee contends (App. Br. p. 51), for Mr. Schrenker, as shown by the testimony and as explained (Op. Br. pp. 55, 64), was devoting his full-time efforts to the sale of Plomb tools.

Conclusion

For the reasons set forth herein and in Appellant's Opening Brief we respectfully submit that the judgment should be reversed.

Respectfully submitted,

O'Melveny & Myers,
Sidney H. Wall,
Clyde E. Tritt,
Attorneys for Appellant.

APPENDIX.

In *Campbell v. Haverhill* (1895), 155 U. S. 610, the court said at pages 614-615:

"It is insisted, however, that by the express terms of section 721, the laws of the several States should be enforced only 'in cases where they apply,' and that they have no application to causes of action created by Congressional legislation and enforceable only in the Federal courts. The argument is, that the law of the forum can only apply to matters within the jurisdiction of the state courts, and that the recognition given by Congress to the laws of the several states does not make such laws applicable to suits over which the state courts have no jurisdiction, because for want of jurisdiction over the subject-matter of the suit, the tribunals of the State are powerless to enforce the state statutes with respect to it; in other words, that the Sates, having no power to create the right or enforce the remedy, have no power to limit such remedy or to legislate in any manner with respect to the subject-matter. But this is rather to assert a distinction than to point out a difference . . ."

And further, at pages 616-617:

"Recurring then to the main proposition above stated, it may be well questioned whether there is any sound distinction in principle between cases where the jurisdiction is concurrent and those where it is exclusive in the Federal courts. The section itself neither contains nor suggests such a distinction. The language of the section is general

that the laws of the several States shall be regarded as rules of decision in every case to which they apply, and it is at least incumbent upon the plaintiff to show that, for some special reason in the nature of the action itself, the section does not apply. But why should the plaintiff in an action for the infringement of a patent be entitled to a privilege denied to plaintiffs in other actions of tort? If States cannot discriminate against such plaintiffs, why should Congress by its silence be assumed to have discriminated in their favor? Why, too, should the fact that Congress has created the right, limit the defenses to which the defendant would otherwise be entitled? Is it not more reasonable to presume that Congress, in authorizing an action for infringement, intended to subject such action to the general laws of the State applicable to actions of a similar nature? In creating a new right and providing a court for the enforcement of such right, must we not presume that Congress intended that the remedy should be enforced in the manner common to like actions within the same jurisdiction?

"Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever; a class of privileged plaintiffs, who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions . . . This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams v. Woods,* 2 Cranch. 336, 342, of a similar statute: 'This would be utterly repunant to the genius of

our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'

"Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired . . ."